**U.S. Department of Labor**

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**MAILED: 01/04/2001**

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| In the Matter of: | | |
| **Roger Leon Johns** | | |
| Claimant | | |
| against | | |
| | BRB No.: | 99-0198 |
| **National Container Repair** | | |
| Employer/Self-Insurer | Case No.: | 1997-LHC-1209 |
| and | OWCP No.: | 6-152812 |
| **ITT Hartford Insurance Co.** | | |
| Carrier | | |

APPEARANCES:

Lori A. Carter, Esq.
For the Claimant

Shari S. Miltiades, Esq.
Traci Grove Smith, Esq.
For the Employer/Carrier

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

## DECISION AND ORDER ON REMAND - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on November 21, 1997 in Savannah, Georgia, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and EX for an Employer's exhibit. This decision

is being rendered after having given full consideration to the entire record.

## PROCEDURAL HISTORY

ALJ Vivian Schreter-Murray, by **Decision and Order** issued on September 22, 1998, concluded that Roger Leon Johns ("Claimant" herein), who was born on March 21, 1951 and who had a seventh grade formal education but no GED (TR 14-15), had been injured on April 21, 1993 in the course of his maritime employment as a welder and chassis container mechanic while working for the Employer, that he had been a member of the ILA since 1979 and that his maritime work was "very heavy type work," was "strenuous work" and that he was "very rushed" and was "always in a hurry to perform his assignments. (TR 17) Judge Schreter-Murray further concluded that Claimant, pursuant to the so-called **Pepco** doctrine, was limited to the schedule benefits for his bilateral carpal tunnel syndrome as the record did not establish that he was totally disabled as the Employer had shown the availability of suitable alternate employment.

Claimant timely appealed from said decision and the Benefits Review Board, by **Decision and Order** issued on November 2, 1999, reversed, vacated and remanded the claim to the Office of Administrative Law Judges for reconsideration of the evidence relating to Claimant's claim for permanent total disability.

The record was docketed at the Office of Administrative Law Judges and Associate Chief Judge A.A. Simpson, Jr., by **ORDER** issued on August 15, 2000 (ALJ EX A), advised the parties of such docketing, that Judge Schreter-Murray had passed away, that the claim would be reassigned to another Administrative Law Judge for a decision on the record and that the parties would have thirty (30) days to object to such procedure. As no comments were filed, the matter was reassigned to this Administrative Law Judge and the parties were advised of such assignment by **ORDER** issued on October 10, 2000. (ALJ EX B)

The Findings of Fact and Conclusions of Law made by my late and distinguished colleague, Judge Schreter-Murray, to the extent not disturbed by the Board, are binding upon the parties as the "Law of the Case," are incorporated herein by reference and as if stated **in extenso** herein and will be reiterated herein only for purposes of clarity and to deal with the Board's clear mandate.

### Summary of the Evidence

As noted above, this claim arises out of an injury that initially occurred on Aril 21, 1993, when Claimant went out of work with bilateral carpal tunnel syndrome after working on a brake

repair job as a mechanic. He had a right carpal tunnel release performed on July 31, 1993 by Dr. Russell Holland. (CX 4)

Claimant returned to work on May 23, 1994 and worked as a mechanic until May 12, 1995, when he stopped again because of bilateral shoulder and arm problems. He has not worked since that time. His primary medical providers since 1995 have been Dr. Joel A. Greenberg, a neurologist, and Dr. Steven J. Novack, a physiatrist.

When Claimant returned to see Dr. Greenberg on August 25, 1995, (CX 2), following his work discontinuation, his primary medical complaints were of hand and arm pain bilaterally. Carpal tunnel syndrome and chronic myofascial pain were diagnosed. His examination revealed tenderness and pain bilaterally in the shoulders. Dr. Greenberg noted in 1995 that the myofascial pain was a longstanding problem that had already been worked up medically. The carpal tunnel syndrome was "the only disorder we could probably treat effectively" and the doctor ordered EMGs to further evaluate the condition. (CX 2)

Dr. Novack subsequently took over Claimant's primary medical treatment, although there were several return visits to Dr. Greenberg. In April, 1996, Dr. Greenberg recommended a cervical myelogram to determine whether there was a structural pathology supporting the Claimant's objective findings. (EX 4) That myelogram was performed, and according to Dr. Greenberg, "I do not see any significant abnormality on that study." (**Id.**)

A follow-up EMG was performed by Dr. Greenberg, at Dr. Novack's request, on May 21, 1997. I note that the Claimant complained bitterly during the EMG. Thus, the muscle was never sampled, and no evidence of swelling or other damage was found. Claimant has not returned to Dr. Greenberg since that visit.

Dr. Novack's course of treatment began in January, 1997 with conservative treatment and medication. A physical capacity evaluation was attempted on February 21, 1997, which the Claimant was unable to complete. (EX 5) According to Dr. Novack, the Claimant completed only about 30% of the functional capacity evaluation (FCE) when he began crying out in pain. Dr. Novack examined Claimant following the FCE and found no acute signs of an emergency. (EX 5)

Dr. Novack continued to treat Claimant conservatively, primarily for right and left arm pain, as well as for his suprascapular problems. In May, 1997, Dr. Novack reviewed recent test results finding that despite Claimant's subjective complaints, there was no evidence for cervical radiculopathy and that any upper extremity and back pain was likely coming from the carpal tunnel syndrome. (EX 5)

A neurosurgical consultation was performed by Dr. Roy Baker on July 17, 1997. A cervical MRI was performed on July 31, 1997, which was unremarkable. Claimant returned to Dr. Baker on August 28, 1997, who reported that Claimant clearly has carpal tunnel syndrome, that a carpal tunnel release on the left was an option, but that the carpal tunnel surgery might not resolve the neck problem beyond cervical strain in light of the findings on MRI and the normal neurologic exam. (CX 7)

On September 11, 1997, Dr. Novack placed Claimant at maximum medical improvement, awarding him five (5%) percent impairment ratings to each upper extremity based on the carpal tunnel surgery on the right and the documented carpal tunnel syndrome on the left. He also gave Claimant the following specific work restriction.

Dr. Novack opined that Claimant "should be able to perform at a medium level job requirement. This is lifting, carrying, pushing and pulling in the 25-50 pound range." However, "Caution should be noted in regard to repetitive fine motor coordination type movements of his hands and fingers bilaterally being there is Carpal Tunnel Syndrome and he can perform those activities as tolerated. That specifically refers to the fine motor repetitive movements." (CX 9)

On October 16, 1997, Dr. Novack issued the following report (CX 9):

"In regard to Dr. Greenberg's comment of a possible RSD of the upper extremity, at this point in time I do not believe Mr. Johns has an RSD diagnosis.

"In regard to my mentioning the Functional Restorative Program, at this point in time with the chronicity of Mr. Roger Johns complaints, I do not feel that a Functional Restorative Program would make any significant changes in his overall condition. I am not recommending the program at this time.

"In regard to objective criteria, Roger Johns does have Carpal Tunnel Syndrome bilaterally status post release on the right. I do believe that his complaints of hand numbness and/or arm pain can be related to the Carpal Tunnel Syndrome and it is not unreasonable to think that he has a secondary muscle tension in the upper back region related to the Carpal Tunnel Syndrome. I do not think he has a primary cervical or upper back injury.

"In regard to impairment ratings, previously I had given him a 10% impairment rating to the whole person based on his bilateral Carpal Tunnel Syndrome.

"In review of his case, using Table 75, IIA, Mr. Johns has unoperated on stable with medically documented injury, pain and rigidity to the neck and upper back with none to minimal

degenerative changes on structural tests such as those involving MRI.

"He did have a MRI back in 1973 with a question of a disc bulge, minimal, C5-6. The 4th Edition AMA **Guidelines** does take into account the 4% impairment rating to the cervical region in that situation. Using the Combined Values Chart to his pre-existing 10% we do have a 14% impairment rating to the whole person."

The Claimant has not looked for any work since being released by Dr. Novack in September, 1997, with the exception of going to the prospective employers identified in the labor market survey performed for the Employer/Carrier in October, 1997. (TR 55) Claimant testified as to his willingness to go out and find a job within his limitations, but there simply are no jobs that he can perform at this time. (TR 64)

On the basis of the totality of this closed record, I make the following:

## Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such

cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The probative testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his bilateral carpal tunnel syndrome and his suprascapular and cervical problems, resulted from working conditions at the Employer's maritime facility.

**Injury**

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd**

**sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszicwicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

As noted above, Judge Schreter-Murray has already concluded, and the Board has affirmed, that Claimant's bilateral hand/arm problems, diagnosed as bilateral carpal tunnel syndrome, as well as his suprascapular/cervical problems, have resulted from his April 21, 1993 work-related injury, that he returned to work on May 23, 1994, however still experiencing bilateral hand/arm and suprascapular/cervical problems, as a result of his physically-demanding duties (CX 2), that he finally had to stop working on May 12, 1995 because of his multiple medical problems, that he went to see Dr. Greenberg on August 25, 1995 for evaluation of his "shooting pain up the right arm from the hand to the shoulder to the neck," that the doctor reported that Claimant's multiple symptoms had worsened and the doctor recommended "consideration of carpal tunnel release on the left and possible re-exploration on the right," as well as "an evaluation by a rehab specialist such as Dr. Novack or Dr. Stonnington."

Accordingly, in view of the foregoing, I find and conclude that Claimant has established a work-related injury, that the Employer had timely notice thereof, accepted the compensability thereof under the state act, paid certain compensation benefits to him and authorized certain medical care and treatment for the Claimant and that he timely filed for benefits once a dispute arose between the parties. In fact, the crucial issue is the nature and extent of Claimant's disability, and issue I shall now resolve.

**Nature and Extent of Disability**

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

**Sections 8(a) and (b) and Total Disability**

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he/she is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is

limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a welder or chassis container mechanic. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any probative or persuasive evidence as to the availability of suitable alternate employment, as further discussed below. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical

evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT)

(2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **See Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott,** 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.,** 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.,** 9 BRBS 138 (1978), **aff'd mem**., 617 F.2d 292 (5th Cir. 1982).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on September 11, 1997 and that he has been permanently and totally disabled from September 12, 1997, according to the well-reasoned opinion of Dr. Novack, Claimant's treating physiatrist, a specialist in rehabilitation medicine. (CX 9)

With reference to Claimant's residual work capacity, it is now well-settled that an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not

like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

It is also well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid at the time of his injury. **Richardson**, **supra**; **Cook**, **supra**.

As noted above, in the event of an injury to a scheduled member, a claimant's permanent partial disability under Section 8(c) is confined to the schedule, and wage-earning capacity is irrelevant. **Potomac Electric Power Company v. Director, OWCP**, 449 U.S. 268, 14 BRBS 363 (1980). If claimant establishes that he is permanently or temporarily totally disabled, however, he may receive benefits under either Section 8(a) or (b) of the Act, 33 U.S.C. §908(a), (b). Where claimant establishes that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of jobs within the geographic area in which claimant resides which he is, by virtue of his age, education, work experience, and physical restrictions, capable of performing and for which he can compete and reasonably secure. **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); **see P&M Crane Co. v. Hayes**, 930 F.2d 424, 24 BRBS 166 (CRT), **reh'g denied**, 935 F.2d 1293 (5th Cir. 1991); **Newport News Shipbuilding & Dry Dock Co. v. Tann**, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988). If employer establishes the availability of suitable alternate employment, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. **Palombo v. Director, OWCP**, 937 F.2d 70, 25 BRBS 1 (CRT) (2nd Cir. 1991);

**Roger's Terminal & Shipping corp. v. Director, OWCP**, 784 F.2d 687, 18 BRBS 79 (5th Cir.), **cert. denied**, 479 U.S. 826 (1986); **Martiniano v. Golten Marine Co.**, 23 BRBS 363 (1990). Claimant does not have to seek the exact jobs identified by employer to establish due diligence. **See Palombo**, 937 F.2d at 74, 25 BRBS at 8 (CRT).

I already have found and concluded the Claimant cannot return to work at his former job and the burden is now on the Employer to establish the availability of suitable, alternate employment for the Claimant within his residual work capacity, his age and intellectual capability and the work restrictions imposed by Dr. Novack.

Mr. William E. Hagen, who testified at the formal hearing, is the Employer's vocational rehabilitation counselor, and, according to Mr. Hagen, Claimant can perform work as an auto-body helper, maintenance utility technician, molder operator and a machine operator, as these four (4) jobs were alleged to involve either light or medium level work. (CX 14; TR 90)

As noted above, Dr. Novack, in his September 11, 1997 report, opined that Claimant should be able to perform a medium level job, which would be limited to lifting, carrying, pushing and pulling in the 25-50 pound range, cautioning that due to Claimant's bilateral carpal tunnel syndrome, repetitive fine motor coordination type movements with his hands could only be performed as tolerated. (CX 9) These activities are below the physical capacity required of a container mechanic, Claimant's former employment with the Employer. Employer's vocational counselor, William Hagen, testified that the work of a container mechanic involves heavy lifting of up to 150 pounds and pushing of up to 300 pounds. (TR 89)

Moreover, this closed record ineluctably leads to the conclusion that Claimant's bilateral hand/arm problems had worsened significantly by the time he had to stop working on May 12, 1995 and when he was finally able to see Dr. Greenberg in August of 1995. Furthermore, the reports of Drs. Greenberg, Baker and Holland all note Claimant's worsening bilateral hand/arm problems subsequent to 1995 and Dr. S. Mark Kamoleson, in his June 17, 1997 report, opined that Claimant's right carpal tunnel release had failed and the doctor recommended that Claimant consider releases on both sides. Claimant agreed and the doctor concluded that "this will be scheduled at his convenience." (CX 4) Dr. Baker also noted the worsening symptoms as of July 17, 1997. (CX 7) These symptoms are also reflected in Claimant's inability to complete his February 21, 1997 Ergos Evaluation. (CX 6)

I also find and conclude that Claimant's physically-demanding work activities between may 23, 1994 and May 12, 1995 aggravated and worsened his pre-existing bilateral carpal tunnel syndrome, thereby forcing him to stop working on May 12, 1995.

Accordingly, as Claimant has established that he cannot return to work at his former job, I shall now consider the Employer's Labor Survey in light of the Board's mandate.

Mr. Hagen's Labor Market Survey is dated October 16, 1997 and was given to the Claimant by his attorney. While Mr. Hagen testified that these four (4) jobs that he identified were suitable and alternate jobs for the Claimant and, most important, were within the work restrictions imposed by Dr. Novack (CX 9; TR 90), Claimant went to those four (4) prospective employers and was unable to obtain work.

Initially, I note that he was not even allowed to apply for two of those jobs, **i.e.**, the molder operator and the machine operator jobs, because those jobs were outside the physical limitations imposed by Dr. Novack. (TR 45-47)

Claimant went to Dan Vaden Companies and applied for the auto-body repair job and he was told that no job was available, although he was allowed to fill out an application. Furthermore, the contact person to whom Claimant spoke on November 4, 1997 advised him that she knew nothing about the Employer's job survey. The employment application is in evidence as CX 14. (Tr 43-44)

When Claimant applied for the maintenance utility technician job at Carson Products, he was not only told that there were no jobs available but also they were not even taking any employment applications. (Tr 43-44)

Claimant also applied for a job as a molder operator at Xylo Moldings, but when he informed them of his bilateral carpal tunnel syndrome, he was told that there was no suitable job for him from a physical standpoint. (TR 45-46)

Claimant also attempted to apply for the machine operator position with Fort James Corporation, but he was not even allowed to fill out an application because he did not have a high school diploma (Claimant has a seventh grade education "roughly" [TR 15]) and because he was told that that job demanded heavy lifting outside his physical restrictions. (TR 46-47)

In view of the foregoing, I find and conclude the Employer's Labor Market Survey (CX 14) is neither probative nor persuasive because the four jobs listed therein are unrealistic, unavailable, unsuitable and, furthermore, the nature and terms of each job are not specifically identified. In furtherance of the standard burden the Employer must prove regarding suitable alternative employment and according to **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), **rev'g** 5 BRBS 418 1977), "The employer must prove the availability of actual, not **theoretical** employment opportunities by identifying specific jobs available to

employee within the local community." (Emphasis added) (**Id.** at 1042-43) The Board held in **Thompson v. Lockheed Shipbuilding & Construction Co.** that for job opportunities to be realistic, the "precise nature, terms, and actual availability of these position" must be shown. (**Id.** at 97) It is insufficient to meet the Employer's burden if a position is open for only a short time frame with no new vacancies anticipated. **See Lentz v. Cottman Co.**, 852 F.2d 1229, 21 BRBS 109 (CRT) (4th Cir. 1988). The Board has consistently held that if it was doubtful as to whether the Claimant could perform the jobs in the survey due to his education and physical restrictions, the Employer has failed to meet the burden of showing suitable and realistic alternate employment. The Employer must present evidence that a range of jobs exists which is reasonably available and which a disabled Claimant is realistically able to secure and perform. **Uglesich v. Stevedoring Services of America**, 24 BRBS 180 (1991); **Lentz**, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988). I note that the Employer has failed to show the precise nature, terms and actual availability of the positions they are proposing for the Claimant as the survey only shows theoretical jobs should those employers be hiring. Claimant, upon applying for the listed jobs, was advised that there were no current or expected openings, even if there had recently been an opening. (TR 40) Moreover, it is obvious that Mr. Hagen clearly did not take into account all of Claimant's factors such as education, physical ability, etc... In fact, Mr. Hagen testified that he knew none of that information and that had he known it, his opinion may have changed given the factors to be considered. (TR 114) A range of jobs which are realistically available and suitable for Claimant to secure was never shown in the instant case, and I so find and conclude.

This Administrative Law Judge, after reviewing the testimony of Mr. Hagen (TR 86-114), finds and, concludes that such testimony is entitled to little or no weight because he had little or no knowledge of Claimant's social and educational history, and specifically his seventh grade education and his lack of a GED, his lack of knowledge of Claimant's entire work history, etc. In this regard, **see Southern V. Farmers Export Co.**, 17 BRBS 64 (1985). Moreover, while Mr. Hagen knew that Claimant would be using tools, equipment and machinery at those four (4) jobs, he could not identify either the type or the size of any such tools, equipment and machinery. (TR 101-105) There is also a serious question as to whether or not Claimant possesses the necessary finger dexterity required by those jobs, especially as Dr. Novack has restricted Claimant to only "occasional" fingering, and not for eight (8) hours daily. (CX 9)

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior

Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternate employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken on this issue many time and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

As there are no wages post May 12, 1995, I must now resolve the legal efficacy of the Employer's Labor Market Survey.

As indicated above, the Employer has offered a Labor Market Survey (CX 14) in an attempt to show the availability of work for Claimant as an auto-body-repairer helper, as a maintenance utility technician, as a molder operator and as a machine operator. I cannot accept the results of that very superficial survey which apparently consisted of the counsellor making a number of telephone calls to prospective employers. While the report refers to

contacts with area employers, (a total of 40), I simply cannot conclude, with any degree of certainty, which prospective employers were contacted by telephone and which job sites were personally visited to observe the working conditions to ascertain whether that work is within the doctor's restrictions and whether Claimant can physically do that work.

It is well-settled that Respondents must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Respondents must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

The Labor Market Survey and the addendum (CX 14) cannot be relied upon by this Administrative Law Judge for the more basic reason that there is a complete absence of any information about the specific nature of the duties of an auto body repairer, for instance, or for a molder operator, etc., and whether such work is within the doctor's physical restrictions. (CX 14) Thus, this Administrative Law Judge has absolutely no idea as to what are the duties of those jobs, at the firms identified by Mr. Hagen.

In view of the foregoing, I cannot accept the results of the Labor Market Survey because, without the required information about each job, I simply am unable to determine whether or not any of those jobs constitutes, as a matter of fact or law, suitable alternative employment or realistic job opportunities. In this regard, **see Armand v. American Marine Corporation**, 21 BRBS 305, 311, 312 (1988); **Horton v. General Dynamics Corp.**, 20 BRBS 99 (1987). **Armand** and **Horton** are significant pronouncements by the Board on this important issue.

Accordingly, in view of the foregoing, I find and conclude that the Employer's Labor Market Survey is fatally defective and neither probative nor persuasive. Therefore, as Claimant has established that he cannot return to work at his former job and as the Employer has not established the availability of suitable alternative employment, for all of the reasons discussed above, I further find and conclude that Claimant is totally disabled on and after May 13, 1995 and that Claimant is entitled to an award of benefits therefor.

**Average Weekly Wage**

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during **substantially** the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and Sons**, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. **Hole v. Miami Shipyards Corp.**, 12 BRBS 38 (1980), **rev'd and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. **See O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). **See also Brien v. Precision Valve/Bayley Marine**, 23 BRBS 207 (1990); **Klubnikin v. Crescent Wharf & Warehouse Co.**, 16 BRBS 183 (1984). Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. **See Waters v. Farmer's Export Co.**, 14 BRBS 102 (1981), **aff'd per curiam**, 710 F.2d 836 (5th Cir. 1983); **Duncan v. Washington Metropolitan Area Transit Authority**, 24 BRBS 133, 136 (1990); **Gilliam v. Addison Crane Co.**, 21 BRBS 91 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," **Duncan**, **supra**, but 33 weeks is not a substantial part of the previous year. **Lozupone**, **supra**. Claimant

worked for the Employer for the six (6) years prior to his April 21, 1993 injury. (TR 16) Therefore Section 10(a) is applicable.

The parties have stipulated that Claimant's average weekly wage is $863.91 (TR 5) and, as such stipulation is corroborated by this record, I accept such stipulation.

**Interest**

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

**Medical Expenses**

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984).

Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury on April 21, 1993 and requested appropriate medical care and treatment. However, while the Employer did accept the claim and did authorize certain medical care under the state act, the claim was not accepted under the Longshore Act until the hearing held herein. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

The transcript reflects that "medical benefits under Section 7 of the Act were paid in an unknown amount with the exception of Dr. Swenson and Dr. Novack." (TR 5)

Accordingly, if those medical bills have not been paid, they should immediately be paid by the Employer/Carrier ("Respondents") herein.

**Section 14(e)**

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Respondents have accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits from the day of the accident, as stipulated by the parties and as the Respondents agreed to pay the appropriate Section 14(e) penalties at the hearing. (TR 5-6) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

**Section 8(f) of the Act**

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from

the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

With reference to this issue, the March 5, 1997 letter of referral from District Director Jeana F. Jackson (ALJ EX 1) reflects that Section 8(f) relief was not raised as an issue while the claim was pending before the District Director. Claimant's pre-hearing statement, the Form LS-18, dated November 27, 1996 (ALJ EX 2) states the issues which were being submitted to the Office of Administrative Law Judges for formal adjudication. The file does not reflect a similar statement from the Employer or Carrier.

At the November 21, 1997 hearing, counsel for the Employer/Carrier raised the issue of Section 8(f) relief and, if permanency was resolved by the presiding juste, then counsel requested a remand of the case so that the issue of such relief can be submitted to and resolved by the District Director. (TR 11-12)

However, as Judge Schreter-Murray limited Claimant to the schedule award for his bilateral carpal tunnel syndrome, Section 8(f) relief was not resolved in the September 22, 1998 Decision and Order Awarding Benefits. Moreover, the issue was not raised before the Board and is not part of its mandate to the Office of Administrative Law Judges.

Furthermore, I note that Claimant's November 27, 1996 Form LS-18 alleged a new work-related injury on May 12, 1995. (ALJ EX 2) However, that new injury was denied by the Georgia State Commissioner and then affirmed by the Georgia Appellate Division. As Respondents' counsel acquiesced in such decision and advised the presiding judge at the November 21, 1997 hearing that "that is not

longer and issue" and "we are not going to come in here today and try to call this a new accident in 1995. We have accepted that (**i.e.**, the May 12, 1995 symptoms) as a change in condition" (TR 9-10), I shall not make any findings on Section 8(f) as the issue was not raised before the District Director

I mention this background to put this issue in proper perspective for guidance of the parties.

**Attorney's Fee**

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer and Carrier (Respondents). Claimant's attorney has not submitted her fee application. Within thirty (30) days of the receipt of this Decision and Order, she shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Respondents' counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after November 2, 1999, the date of the Board's decision. Services performed prior to that date should be submitted to the Board for its consideration.

**ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer and Carrier ("Respondents") shall pay to the Claimant compensation for his temporary total disability from April 21, 1993 through May 22, 1994, and from May 13, 1995 through September 11, 1997, based upon an average weekly wage of $863.91, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on September 12, 1997, and continuing until further **ORDER** of this Court, the Respondents shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $863.91, such compensation to be computed in accordance with Section 8(a) of the Act.

3. The Respondents shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his April 21, 1993 injury.

4. Interest shall be paid by the Respondents on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Respondents shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, including payment of unpaid medical bills relating to Claimant's work-related injury before me, subject to the provisions of Section 7 of the Act.

6. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Respondents' counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after November 2, 1999, the date of the Board's decision.

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**DAVID W. DI NARDI**
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jl